DEVELOPMENT & COMMERCIAL BANK BHD.

v.

KIM MING CHOON

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[ORIGINATING SUMMONS NO. 31-345 OF 1986]
10 JANUARY 1991

LAND LAW: *Order of sale made by Judge - Period for completion of sale specified - Application for extension of time is a variation - Can only be varied by Judge - Senior Assistant Registrar has no jurisdiction to vary.*

LAND LAW: *Order for sale - Specified date of completion - Successful bidder - Caveat - Application for extension of time to complete sale - Parties to application foreign to the original action - Non-compliance with Rules of the High Court 1980 - Rights of chargee and chargor ignored - Registration of name as registered proprietor - Can be removed under certain circumstances - Knowledge of encumbrances - National Land Code 1965, s. 417.*

The respondent K was the registered owner of a piece of land on which a double storey terrace house is erected (the said property) which was charged by K to D & C bank, the applicant bank, in consideration of a loan. K defaulted in the repayment and D & C sought foreclosure of the said property. On 29 September 1986, Shankar J granted an order for sale, stating that the date of sale was to be fixed by the Senior Assistant Registrar (SAR) to satisfy the sum of RM233,038.93 and that payment the balance of purchase price was to be within 3 months from payment of initial deposit of 25%.

The usual summons for direction followed and on 17 January 1987, the SAR made a consequential order of sale as to the method of sale. Y successfully bid for the property and applied for a loan to finance the purchase; he discovered that one L had lodged a caveat - L purportedly had contracted to buy the property from K after the order for sale was granted.

On 5 March 1988 Y and his wife C, applied to the SAR for extension of the completion date; however the applicant was stated to be Y & C and L the caveator was named as respondent. On 21 March 1988, the SAR granted Y & C's application and granted a period of 6 months instead of the original 3 months stated in Shankar J's order. K applied to set aside this decision of the SAR and this was dismissed; hence K appealed (the first appeal). In the interim, Y then sought further extension of time which the SAR granted; K also applied to set aside this order but the SAR dismissed his application; L appealed against this decision (the second appeal).

Held:

[1] In the application dated 5 March 1988, both the names of the original parties were left out and instead Y, C and L were named - these persons are not parties to the original action and neither was there any application to include them as parties in this action - there was a total disregard of the Rules of the High Court 1980.

[2] Furthermore, the said application was made *ex parte* and the order dated 21 March 1988 was only known to Y & C; the rights of D & C Bank as the chargee of the said property and the rights of K as chargor and the caveator L were completely ignored.

[3] Although the rights of K as chargor ceases when the order for sale was made, K's rights are not completely lost; he abrogates his rights and power to dispose of the said property to the chargee on condition that the sale of his property is carried out in accordance with the orders granted by the Court under the order for sale and other consequential orders.

[4] In this case, the period of completion was clearly stated in the order for sale to be 3 months and any variation would be a breach which would result in the rights of the chargor being restored pending fresh orders - any delay in the completion of sale would prejudice the chargor in having to bear further interest charges levied by the chargee.

[5] Extension of time is a variation of the said order for sale and any application for such a variation must be heard before a Judge; the SAR has no power to vary the orders for sale issued by the Judge.

[6] (a) Although Y has managed to register the property in his name and submits therefore that his title is indefeasible, the Court rejects such contention as to do so would be to allow Y to be the registered proprietor when he in fact has breached the terms and conditions of sale.

(b) The Court has the power under s. 417 of the National Land Code to direct the Collector or Registrar to do all such things as may be necessary to give effect to its judgment or orders;

(c) Y was advised of the terms and conditions of the public auction sale and he agreed to abide by them; Y should have checked to see if there were any caveats as otherwise Y buys with any existing encumbrances.

[7] As Y failed to make payment at the time set for completion of sale under the order for sale, he had breached the terms and conditions of sale and as such his deposit and initial payment is forfeited and the sale annulled.

[1st and 2nd appeal allowed.]

Cases referred to:
Malayan United Finance Bhd. Johor Bahru v. Liew Yet Lan [1990] 1 MLJ 317
Siland Sdn. Bhd. & Anor. v. M & J Frozen Food Sdn. Bhd. & Anor. [1990] 3 CLJ (Rep) 94
Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor. [1970] 2 MLJ 226

Legislation referred to:
National Land Code 1965, ss. 256, 257, 340
Rules of the High Court 1980, O. 15 r. 6

For the Applicant - David Ng Kim Seng; M/s. Lim & Hooi
For the Respondent - C.H. Ng; M/s. Leng & Co.
For the Bidder - Wong Kim Fatt (Mrs. Ong Peck Ha with him); M/s. Ong & Ong
For the Caveator - Nordin Husin; M/s. Tia & Nordin

JUDGMENT

James Foong JC:

There are 2 appeals in this case. These 2 appeals are against the decisions of the Senior Assistant Registrar. The 1st appeal is found in encl. 47 and the 2nd appeal is in encl. 68. Both these appeals arise from the same sequence of facts.

The facts of this case are as follows.

a A person by the name of Kim Ming Choon (Kim) the appellant in this case was the registered owner of a piece of property held under HS(D) 41832, PTD 19847 situated in the Mukim of Plentong in the District of Johor Bahru, consisting of an area of 1,848 square feet and on which a double storey terrace house is erected thereon known as No. 56, Jalan Sri Pelangi, Taman Pelangi, Johor Bahru (all of which shall hereinafter be referred to as the "said property").

b The said property was charged by Kim to Development and Commercial Bank Bhd., Johor Bahru (D & C Bank) by way of a first legal charge in consideration of a loan granted by D & C Bank. There was a default in repayment of the said loan and D & C Bank proceeded with foreclosure proceedings against the said property.

On 29 September 1986 the Honourable Mr. Justice Shankar granted an order for sale. (This
c order shall hereinafter be referred to as "the order for sale".)

The said order for sale consists of (as is the usual case) various sub-orders. I shall highlight herein some of the orders made in the order for sale.

(1) That the said land "be sold by public auction under s. 256 and s. 257 of the National Land Code (Act 56 of 1965) to satisfy the sum of RM233,038.93 as at date of order and
d further interest thereon at the prescribed rate currently in force to the time of sale or satisfaction thereof.

(2) And it is also ordered that the date of the sale shall be fixed by the Senior Assistant Registrar of this Honourable Court.

(3) And it also further ordered that the conditions of sale be varied to all the successful
e purchasers to pay the balance of the purchase price of the said land within a period of three (3) months from the payment of the initial deposit of 25%.

Subsequent to the order of sale the usual summons for directions followed and on 17 January 1987 the Senior Assistant Registrar of the High Court, Johor Bahru made an order setting out the detailed procedure of how the sale of the said property should be conducted. This order of the Senior Assistant Registrar dated 17 January 1987 shall hereinafter be referred to
f as the consequential orders of sale.

The consequential orders of sale para. (f) ordered:

> That conditions of sale be Johor Conditions of Sale where applicable and the appointed auctioneer do prepare the same.

g On 28 February 1988 one Yu Cheng Hee (the bidder) successfully bid for the purchase of the said property at a public auction and a memorandum of contract for this purchase was entered into between him and the appointed auctioneer. The bidder paid the 25% of the purchase price and the balance of the purchase price would have to be paid on 28 May 1988 (the completion date) which was 3 months from the date of successful bid.

The bidder proceeded to apply for a bank loan to finance his purchase. In the course of
h doing so he discovered that there was a caveat on the said property levied by a third party, one Lee Thian Pah (hereinafter shall be referred to as "the caveator") who purported to have entered into a sale and purchase agreement with Kim for the purchase of the said property after the order for sale was granted.

Before the completion date, the bidder and his wife one Chin Sar Lee applied to the Senior

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Assistant Registrar to have the completion date extended.

This application before the Senior Assistant Registrar bears exactly the same heading as the order for sale except for:

(a) an additional heading - "In the Matter of the Private Caveat entered on 16 February 1988 by Lee Thian Pah in respect of the above stated property" and

(b) the parties are not the same. In this application D & C Bank's name is missing and substituted as applicants are the name of the bidder and that of his wife Chin Sar Lee (f). The respondent's name in this application was also changed to Lee Thian Pah, the caveator.

Further this application was as admitted by the parties in this appeal made *ex parte.*

In consequence to this application, the Senior Assistant Registrar on 21 March 1988 granted an order for the bidder and his wife to extend the completion date and pay the balance of the purchase price six months from 28 February 1988 instead of three months.

On 12 April 1988, Kim knew of the extension granted on the completion date and applied to set aside the decision of the Senior Assistant Registrar dated 21 March 1988.

On 16 August 1988 the Senior Assistant Registrar dismissed Kim's application to set aside. Dissatisfied with this decision, Kim appealed to this Honourable Court and thus forms the first appeal in this case.

While awaiting hearing of the first appeal, the bidder proceeded to appeal for further extension of time to complete the sale. On his third attempt the Senior Assistant Registrar granted further extension of time to complete the sale and to pay the balance of the purchase price.

Kim again applied to set aside this order for extension. The Senior Assistant Registrar dismissed the application and Lee appealed to this Honourable Court against the decision of the Senior Assistant Registrar. This appeal hence forms the basis of the second appeal in this case.

In order of priority this Court shall first deal with the first appeal.

In the first instance, the first application dated 5 March 1988 made by the bidder for the extension of time to complete the sale (which application shall hereinafter be referred to as the "said application") the parties named there are incorrect. In the said application there seems to be a total disregard not only to the Rules of the High Court relating to parties to an action. It included persons both as applicants and respondent who are not even parties to the original action.

The parties in the original order for sale are D & C Bank as the applicant and Kim as the respondent. In the said application both D & C Bank's and Kim's names were left out completely. Instead the bidder's name was included together with that of his wife Chin Sar Lee (f). They were named as the applicants. As for the respondent Lee Thian Pah, the caveator, was named.

The presence of all the aforesaid parties in the said application are all foreign to the original action. There were no applications before the Courts to include any of these people as parties in the action though provided for, with leave of Court under O. 15 r. 6 of the Rules of the High Court.

Secondly, not only were the names of the parties in the original action not included, the

said application was made *ex parte*. In short when the order for extension of time to complete the sale was made on 21 March 1988 it was only known to the bidder and his wife. The rights of the D & C Bank as the chargee of the said property; the rights of Kim the chargor and even the outsider the caveator were completely ignored.

It was argued by the bidder, the respondent in this appeal, that the rights of Kim as chargor of the said property ceases when the order for sale was made. The case of *Malayan United Finance Bhd. Johor Bahru v. Liew Yet Lan* [1990] 1 MLJ 317 was cited in support.

With greatest respect I agree with the aforesaid decision. However I wish to add that the chargor's rights under an order for sale by the Court pursuant to ss. 256 and 257 of the National Land Code are not completely lost when the order for sale is made. He abrogates his rights and power to dispose of the said property to the chargee on condition that the sale of his property is carried out in accordance with the orders granted by the Court under the order for sale and other consequential orders arising therefrom.

In the event that the order for sale and the consequential orders are breached and, that the sale under such orders is aborted, his rights are restored pending fresh orders, (if any).

In this particular case the period of three months to complete the sale by payment of the balance of the purchase price from date of the successful bid in a public auction is clearly stated in the order for sale. Any variation from this would affect the rights of the chargor and he should be heard.

I am in total agreement with the Honourable Judicial Commissioner Mr. Richard Tallala in the case of *Siland Sdn. Bhd. & Anor. v. M & J Frozen Food Sdn. Bhd. & Anor.* [1990] 3 CLJ (Rep) 94 which case was cited during this hearing. As expressed therein any delay in the completion of such sale would prejudice the chargor in having to bear further interest charges levied by the chargee.

Thirdly this Court is of the view that the Senior Assistant Registrar has no power to vary the order for sale issued by the learned Judge in this case. Extension of time is a variation of the said order for sale when the same clearly states the period of three months from date of a successful bid to complete the sale. Application for extension of time must therefore be by way of a variation of the said order for sale and as such must be heard before a Judge.

During the hearing of this appeal, the learned Counsel for the bidder informed this Court that the said property is now registered in the name of the bidder as the registered proprietor. The bidder had since the filing of the second appeal by Kim paid the balance of the purchase price and by using one of the orders in the order for sale convinced the Land Office to transfer the said property to himself subject to the said caveat.

As such it was argued that under s. 340 of the National Land Code the title of a registered proprietor is indefeasible once registered except for fraud and misrepresentation.

This Court rejects such contention. To accept the same would restrict the Courts to do justice and to allow the bidder to be the registered proprietor when he in fact has breached the terms and conditions of sale. As stated in the case of *Sungei Biak Tin Mines Ltd. v. Saw Choon Theng & Anor.* [1970] 2 MLJ 226 this Court has the power under s. 417 of the National Land Code to direct the Collector or Registrar to do all such things as may be necessary to give effect to its judgments or orders. To quote Lord President Tun Suffian in the same case:

> If we did not order the collector to remove Mr. Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr. Lee to thumb their noses at a judgment of the Federal Court and I do not think that we should allow that.

Though it was argued by the learned Counsel for the bidder that he was an innocent purchaser at a public sale who was not aware of a caveat so imposed on the said property, this Court finds that bidder proceeded on to bid for the purchase with his eyes opened.

Under the consequential orders arising from the order for sale, the Johor Conditions of Sale was used as the terms and conditions of the public auction sale. These terms and conditions were made known to the bidder and he agreed to be abided by it.

Under clause 12 of the Johor Conditions of Sale it is clearly stated that:

> the said property is sold subject to all existing leases, tenancies, caveats and occupancies and the right of claim of any tenant or occupiers thereunder and the purchasers shall be deemed to have full knowledge of the state and conditions of the property.

Under such circumstances the bidder should have been more careful to check on the said property as to whether there were any caveats thereon.

In this case, as stated in the terms and conditions of sale, he buys with any encumbrances thereon.

Clause 21 of the Johor Conditions of Sale provides for forfeiture of the deposits and initial payment of the bidder if he fails to complete the sale on time by paying the balance of the purchase price.

At the time set for the completion of sale under the order for sale, the bidder failed to make payment. Under such circumstances, he is in breach of the terms and conditions of sale and as such his deposit and initial payment would have to be forfeited and the sale annulled.

In view of the grounds as stated aforesaid this Court allows the appellant's first appeal as follows;

(1) the sale to the bidder Yu Cheng Hee at public auction on 28 February 1988 be treated as aborted;

(2) the deposit and part payment of RM32,000 so paid by the bidder be forfeited to the chargee D & C Bank towards the account of the chargor to set off outstanding sum due by the chargor to the chargee;

(3) the balance of the purchase price be refunded to the bidder;

(4) that the Director of Lands & Mines do remove the name of the bidder from the Register of Titles to the said property and re-enter the name of the appellant therein and that all costs and expenses relating to this to be borne by the bidder;

(5) cost of this appeal to the appellant.

As for the 2nd Appeal this order also allows the same with cost.

Also found at [1991] 1 CLJ 732